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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES A. GHENT, JR.,

Petitioner,

vs.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; TONY E. GALLEGOS; GILBERT F. CASELLAS; CORRADO GIGANTE; STATE OF NEW JERSEY; SUPREME COURT OF NEW JERSEY; ROBERT D. LIPSHER; FEE ARBITRATION COMMITTEE DISTRICT XI, ET AL.; ANTHONY BENEVENTO; ROBERT C. LA SALLE; MARY E. MARBAN; THOMAS ZICCARDI,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should certiorari be granted to correct the Court of Appeals' decision which cites *Borelli v. City of Reading*, 532 F.2d 950 (3d Cir. 1976) as controlling on the issue of jurisdiction for appellate review under 28 U.S.C. § 1291 which decision is in direct conflict with *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, (1949); *McLish v. Roff*, 141 U.S. 661, (1891); *Digital Equipment Corporation v. Desktop Direct, Inc.*, 114 S.Ct. 1992, (1994); *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979)?

2. Whether the United States Court of Appeals for the Third Circuit is bound by the doctrine of "*stare decisis*" as applied by the Supreme Court of the United States in *United States v. Gaudin*, 115 S.Ct. 2310, (1995) and *Patterson v. McLean Credit Union*, 491 U.S. 164, (1989).

3. Are the officers, officials, and agents of the United States Equal Employment Opportunity Commission and the State of New Jersey immune from suit for discriminatory practices in violation of the Fifth and Fourteenth Amendments Equal Protection and Due Process Clauses of the United States Constitution, and Civil Rights legislation, specifically the Civil Right Act of 1964, 42 U.S.C. § 2000e-6, et seq., *Adarand Constructors, Inc. v. Pena, Secretary of Transportation, et al.*, 115 S.Ct. 2097, (1995); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, (1971); *Fitzpatrick v. Bitzer*, 427 U.S. 445, (1976); *Shelley v. Kraemer*, 334 U.S. 1 (1947)?

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Respondents.

PETITION FOR WRIT OF CERTIORARI

James A. Ghent, Jr. ("Petitioner") hereby petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Third Circuit.

The Court of Appeals incorrectly relied on *Borelli v. City of Reading*, 532 F.2d 950 (3d Cir. 1976) as controlling on the issue of appellate review under 28 U.S.C. § 1291, contrary to this Court's holdings in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *McLish v. Roff*,141 U.S. 661 (1891); *Digital Equipment Corporation v.*

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[1]All known parties to this proceeding have been named in the caption of this petition.

Desktop Direct, Inc., 114 S.Ct. 1992, (1994); and decisions within its own jurisdiction, namely *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979).

The Appellate Court abused its authority by not abiding by the doctrine of *"stare decisis"* as applied by this Court in *United States v. Gaudin*, 115 S.Ct. 2310, (1995); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). By failing to follow this Court's lead, it has refused to hear an appeal from the District Court which holds that federal officers and officials of the United States Equal Employment Opportunity Commission (EEOC) are immune from suit for allegations made against them for their actions which are violative of the Fifth Amendment of the Constitution; and that the State of New Jersey, its officials, officers, and agents are immune from suit for discriminatory patterns and practices in employment opportunities under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, contrary to this Court's rulings in *Shelley v. Kraemer*, 334 U.S. 1 (1947); *Harlowe v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 427 U.S. 511 (1985); and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), in addition to The Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e, et seq., through which the EEOC derives its mandate from Congress to enforce equal employment opportunities. By utilizing a pattern and practice of discriminatory processing of equal employment complaints, the EEOC is selectively processing complaints contrary to the mandates of Congress under 42 U.S.C. § 2000e-6, [Section 707], and the EEOC's prior ruling in EEOC Decision 87-2, 1987 WL 68471 (August 31, 1987) (discriminatory activity by state electrician licensing agency within ambit of § 2000e-6). This has caused the Petitioner to pursue an investigation and proceed with litigation due to the EEOC's failure to act because "There fails to exist an employer employee relationship."

The Appellate Court denied Petitioner's original request

for review and a subsequent request for rehearing in which the Appellate Court was apprised of this Court's prior rulings on the issue of jurisdiction under 28 U.S.C. § 1291. This let stand a Memorandum Opinion from the District Court which dismissed the Petitioner's Complaint, without prejudice, contrary to the remedies available for alleged discriminatory conduct under the Fifth and Fourteenth Amendments, and several Federal Statutes, specifically Title VII and its progeny. The District Court further failed to recognize the potential for liability under the Fifth Amendment of the Constitution for alleged Equal Protection and Due Process violations by federal actors as provided for by this Court in *Adarand v. Pena*, 115 S.Ct. 2097 (1995); *Buckley v. Valeo*, 424 U.S. 1 (1976); and other cases.

Moreover, the Court of Appeals has abrogated its responsibility in this matter by refusing to hear Petitioner's appeal on jurisdictional grounds because the Appellate Court has erroneously taken the position that the District Court's dismissal, without prejudice, is not a final order, when in fact some of the issues which are the subject of the case have been summarily dismissed.

An application of the Constitutional provisions of the Fifth Amendment Equal Protection and Due Process Clauses provides a basis for the action against the EEOC, per this Court's rulings in *Adarand* and *Buckley*. In addition, the Fourteenth Amendment's Equal Protection Clause and Due Process Clause provide a basis for the action against the State of New Jersey and their officers, officials,and agents named as provided for in this Court's rulings in *Shelley*, *Harlowe*, *Mitchell*, and *Fitzpatrick*.

Although other remedies under other theories are contained in the Petitioner's Complaint, they are not directly presented to this Court under the specific "issues presented."

OPINIONS AND ORDERS BELOW

1. The Court of Appeals, September 26, 1995, order is reproduced in Appendix ("App.")C. That Court's order is unreported.

2. The Court of Appeals, July 25, 1995, order is reproduced in App. A.

3. The District Court's Order and Memorandum Opinion, which was unreported, is reproduced in App. B.

JURISDICTION

The District Court asserted jurisdiction under 28 U.S.C. §§ 1331 and 1332. The Court of Appeals jurisdiction was based on 28 U.S.C. § 1291. The denial of Appellate review on jurisdictional grounds is at issue in this matter. This Court has jurisdiction pursuant to United States Supreme Court Rule 10(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case principally involves the Fifth and Fourteenth Amendments to the United States Constitution, The Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e, et seq., and provisions of a New Jersey Statute, which has been declared constitutional by the New Jersey Supreme Court. The Fifth Amendment states in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment declares in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process or law; nor deny to any person within its jurisdiction the equal protection of the law.

The relevant provisions of Title VII, 42 U.S.C. § 2000e-6, [section 707] provide:

> (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint . . .
>
> (c) Effective two years after March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions...

The relevant section of the New Jersey Rule of Court, Rule 1:20A has been adjudicated by the New Jersey Supreme Court and is recorded as *In re LiVolsi*, 428 A.2d 1268 (1981).

STATEMENT OF THE CASE

A. The History and Background

On or about February 12, 1992, the Petitioner, an African-American resident of the State of New York and a licensed attorney, entered into a written agreement to provide legal representation to a relative of the Petitioner's wife and that relative's husband (the clients) who were being sued. After lengthy representation that began in November 1991 and proceeded through June of 1993, the clients refused to pay and elected to pursue a remedy through the State of New Jersey's Fee Arbitration procedure, which is administered by the Supreme Court of New Jersey, Rule 1:20-A-3(b), as supplied to the Petitioner in a letter dated July 9, 1993 and provides in pertinent part:

> In accordance with R.1:20A-3(b), I am serving upon you one copy of a Fee Arbitration Request. I also enclose an Attorney Fee Response form which you are required to complete within twenty (20) days.
> . . .
> Both you and the client are advised that hereafter all inquiries should be directed solely to the designated Panel Chair or Single Arbitrator, whose name and address is shown on the attached sheet. . . If a lawsuit is pending regarding this fee, the attorney must request that the suit be stayed pending resolution of the matter by the Fee Committee.

Page 2, of the Attorney Arbitration Request Form states in part that:

> Fee proceedings are confidential. So long as

> you maintain this confidentiality, Supreme Court Rule 1:20-11(b) grants immunity from lawsuits within this state as a result of filing this fee dispute. **IF YOU BREACH THIS RULE OF CONFIDENTIALITY YOU WILL LOSE THIS IMMUNITY.** Bold is in the original.

Petitioner filed suit in New Jersey Superior Court on October 18, 1993, and is recorded as *Ghent v. Santana*, Docket No. PAS-L-8140-93, because the Clients breached the rule of confidentiality. However, even though the arbitration panel was notified by the Petitioner that the clients had "breached this rule," the arbitration panel proceeded to hear and submit a written determination, contrary to the published rules submitted to the Petitioner and the Clients, and were therefore without jurisdiction to hear the matter. The arbitration decision states:

> Although there is what purports to be a written Retainer Agreement, providing for an hourly rate of $100 per hour, the clients advised the attorney that they could not afford to pay that amount and relied upon the Attorney's representation that he would adjust the fee at the end of the case, as a courtesy, since the parties are family members and were residing together. . . . Nevertheless it is evident that the attorney performed substantial services on the Clients' behalf and that he did so in a professionally competent manner.

Petitioner relied on this agreement, to his detriment, as wages from employment and filed a complaint with the United States Equal Employment Opportunity Commission

(EEOC) on June 21, 1994 because the Petitioner believes the arbitration decision to be racially motivated, based on local ties and commitment to friends in the community, unequitable and unjust, and defamatory because it has placed the Petitioner's reputation in his profession in question as follows. This arbitration decision was required to be submitted to the Connecticut Bar Examining Committee who found it necessary to conduct an investigation based on this arbitration decision and *Ghent v. Santana*, PAS-L-8140-93. The Petitioner was obliged to appear personally before the Character and Fitness Panel to defend the manner in which he represented the clients in the underlying action. After this investigation, the Petitioner was admitted to the Connecticut Bar.

The EEOC Complaint was acknowledged by letter dated June 30, 1994 and provided Charge No. 165940395.

By form letter signed August 31, 1994, by Corrado Gigante, Area Director, the Petitioner was provided with a "Notice of Right to Sue," because "There fails to exist an employer-employee relationship." Based on information that the Petitioner had received from the EEOC (a copy of EEOC Decision 87-2, 1987 WL 68471 (August 31, 1987 - Discriminatory activity by state electrician licensing agency within ambit of § 2000e-6)), the existence of an "employer-employee relationship" is not necessary under this section in order for the EEOC to act upon a complaint.

This was communicated to Corrado Gigante of the EEOC by letter dated September 6, 1994. By letter dated September 20, 1994 from Corrado Gigante, reference is made to the "Commission's Procedural Regulations" 29 CFR 1601.2, which:

> . . . set forth definitions for terms defined in Title VII of the Civil Rights Act. The definitions are those as found in § 701 of Title VII of the Civil Rights Act.

> Equal Employment Opportunity Commission Compliance Manual Volume II, Sec. 606.11 reads "In order for the Commission to have jurisdiction over a charge, the charging party must be an employee within the meaning of 701 (f) of Title VII, or be a former employee or an applicant for employment."

The Petitioner then contacted Tony E. Gallegos, Chairman, by letter dated September 23, 1994, requesting that he intervene in the matter. By letter dated October 14, 1994 from James H. Troy, Director, Office of Program Operations, he states that "Chairman Gilbert F. Casellas has asked this office to respond directly to you." In Mr. Troy's letter, he affirmed the position taken by Corrado Gigante, even after having received a copy of EEOC Decision 87-2.

The Petitioner filed suit on November 29, 1994 in the United States District Court for the District of New Jersey, referred to as *Ghent v. EEOC, et al.*, D.N.J. Civ. No. 94-cv-05759, based on the "Notice of Right to Sue" letter from the EEOC, and within the 90 days as provided by that notice.

B. Proceedings Below

The allegations of the Petitioner's Complaint, filed jointly and severally, were based on violations of Article 1, § 10 and the Fifth, Thirteenth, and Fourteenth Amendments of the United States Constitution; The Federal Tort Claims Act, 28 U.S.C. § 2671, et al., and 29 U.S.C.A. § 794; the Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. §§ 1981, 1982, 1983, 1985, 2000e et seq.; 28 U.S.C. §§ 1331 and 1332, pattern and practice of discrimination, conspiracy, and defamation. The Petitioner

sought nominal, compensatory and punitive damages, attorney's fees, and costs, and injunctive relief, and requested that the funds, as provided for in § 2000e-6(c) be discontinued until the EEOC, et al., were in compliance with the Congressional mandates of the Civil Rights Act of 1964, et seq.

The Attorneys for the Defendants below: John D. Norquist, Office of Legal Counsel, United States Equal Employment Opportunity Commission, filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(B)(6), and 12(b)(5), on behalf of the EEOC Defendants. Defendants Tony E. Gallegos, Gilbert F. Casellas, and Corrado Gigante did not respond although served by certified mail at the only address known for each of these parties.

The EEOC motion is based on 1) Title VII creates no right of action against the EEOC; 2) 42 U.S.C. § 1981 does not apply because the EEOC has not deprived the petitioner of any contract rights or other benefits of the law; 3) 42 U.S.C. § 1982 protects the rights of citizens to inherit, purchase, lease, sell, hoid and convey real and personal property regardless of race and does not apply to employment discrimination; 4) 42 U.S.C. § 1983 applies only to persons acting under color of law of any state or territory or District of Columbia not federal officials acting under color of federal law; 5) 42 U.S.C. § 1985 may not be invoked to redress violations of Title VII, the rationale being that it would permit complainants to bypass the comprehensive procedural requirements of Title VII, nor is it available against federal officers acting under color of state law; 6) 42 U.S.C. § 1986 does not contemplate actions against federal officials acting under color of federal law; 6) Fifth or Fourteenth Amendment rights do not apply because the Fourteenth Amendment applies to states and the Fifth Amendment because he has not been denied any liberty or property rights under the Fifth

Amendment. Where an agency does not make binding decisions, Fifth Amendment rights are not infringed; 7) Federal Torts Claims Act mandates that actions not be instituted against the United States for money damages caused by a wrongful act or omission of any of its employees while acting within the scope of his employment, unless first presenting his claim to the U.S. Agency involved and that agency has denied the claim; 8) the Rehabilitation act provides for non-discrimination on the basis of disability in programs or activities coordinated by federal agencies; 9) the EEOC is not a proper defendant under Title VII; 10) improper service was made upon Casellas, Gallegos and Gigante and therefore Rules 12 (b)(2) and (b)(5) would apply for lack of personal jurisdiction and insufficiency of service of process; and 11) any monetary claims against the agency are barred by sovereign immunity.

Timothy P. Crowley, Deputy Attorney General, for Deborah T. Poritz, Attorney General of New Jersey, filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on behalf of The State of New Jersey, The Supreme Court of New Jersey, and the Fee Arbitration Committee of the Supreme Court of New Jersey by letter brief dated January 18, 1995. Defendants Robert C. La Salle, Mary E. Marban, and Thomas Ziccardi did not respond although served by certified mail at the only address known for each of these parties. Mr. Crowley states at Point I that the New Jersey Defendants are Absolutely Immune from Damages arising out of Judicial acts within their discretion; Point 2, suit is barred by the eleventh amendment; Point 3, 42 U.S.C. § 1983 does not apply because the state is not a person; Point 4, failure to plead facts demonstrating lack of subject matter jurisdiction.

The District Court dismissed the complaint, without prejudice, stating that:

> A complaint cannot be dismissed unless the Court is certain that no set of facts can be proved that would entitle plaintiff to relief. Id., *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Nonetheless, even a cursory perusal of the complaint in this matter reveals that the facts **as alleged** create no cause of action in favor of plaintiff. See Memorandum Opinion of the District Court and Order dated April 17, 1995 contained in Appendix B. Emphasis added.

Petitioner filed a Notice of Appeal with the United States Court of Appeals for the Third Circuit which was docketed on June 20, 1995, since the dismissal of the complaint effectively foreclosed any further adjudication on the merits based on the determination by the District Court that "the facts as alleged create no cause of action in favor of plaintiff."

The Court of Appeals by letter dated June 21, 1995 from Elizabeth A. Cormier, Supervising Staff Attorney, informed the Petitioner that the case would be dismissed on appellate jurisdictional grounds because it is not a final order under 28 U.S.C. § 1291 and cited "*Borelli v. City of Reading*, 532 F.2d 950 (3d Cir. 1976)(per curiam)(to be final, order of dismissal must be with prejudice; order dismissing with leave to amend is interlocutory unless plaintiff elects to stand on complaint."

On July 3, 1995 the Petitioner filed a Notice of Appellate Jurisdiction which brought to the attention of the Court of Appeals that the language in *Borelli* is not dispositive of the issue of appellate review since it qualifies its opinion with the conditional language of "generally." In

addition the Petitioner cited other authority in support of the conditional language in *Borelli* and other Third Circuit, and other Appellate Court authority which relies on *Cohen, Forsyth* and *Mitchell*, supra.

By Order dated July 25, 1995, the Appellate Court dismissed Petitioner's appeal for lack of jurisdiction , because of lack of a final order, citing 28 U.S.C. § 1291 and *Borelli*, and a Petition for Rehearing in Banc was filed on August 31, 1995 citing as authoritative prior decisions of the Third Circuit and the Supreme Court of the United States regarding the interpretation to be given to § 1291.

By Order, without comment, the petition was denied and this Petition for Certiorari follows. Petitioner directs this Court to the decisions of the Appellate Court and the District Court's Memorandum opinion for the purpose of this Petition.

REASONS FOR GRANTING THE WRIT

A. The Court Should Grant The Petition To Review The Third Circuit's Refusal To Follow The Law Set Forth In *Cohen*

The Third Circuit Court of Appeals opinion effectively ignores the law stated in *Cohen*, in this case brought before the Court of Appeals, although it has found *Cohen* to be authoritative in other cases before the Third Circuit. Instead, it relies on the case of *Borelli,* supra, as dispositive on the issue of appellate jurisdiction under 28 U.S.C. § 1291. Even in *Borelli*, the conditional language prevents a conclusive finding of a lack of jurisdiction without an examination on the merits:

> Settled policy in the federal courts **discourages** piecemeal appeals and, so, **generally** recourse may be had to appellate tribunals only when final orders are the

> subject of review. **While the inevitable exceptions exist,** . . . Id. at 951. Emphasis added.

This ruling begs the questions: What does "generally" mean? What are considered the "inevitable exceptions"?

First in *McLish*, supra, and later in *Cohen*, supra, a case whose origin is in the Third Circuit, the interpretation of jurisdiction under § 1291 was provided recognizing an exception to the "final order" provisions of § 1291 as a "practical rather than a technical construction. *Bank of Columbia v. Sweeney*, 1 Pet. 567, 569; *United States v. River Rouge Co.*, 269 U.S. 323, 328." *Cohen*, at 546.

Again in *Forsyth,* supra, the Third Circuit Court of Appeals addressed the jurisdictional issue and relied on *Cohen*. In this case, similar to the case presented to the District Court, the issue of immunity was raised before the Court. In the District Court's Memorandum Opinion (DCMO), the Court states that "Judicial officers enjoy an absolute immunity from suit for judicial acts taken in their official capacity." See DCMO page 8 in Appendix (App.) B.

An issue in this case is whether the within named parties are properly classified as "judicial officers" entitled to "absolute immunity" from liability for alleged violations of Constitutional Rights and Federal Law through discriminatory practices?

This Court addressed the issue of impartial jurist in In Re *Murchison, et al.*, 349 U.S. 133 (1955) and stated:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent **even the probability of unfairness**. To this end no man is permitted to try cases where he has an interest in the outcome. That interest

> cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.
>
> But to perform its high function in the best way **"justice must satisfy the appearance of justice."** *Offutt v. United States*, 348 U.S. 11, 14. Id. at 136. Emphasis added.

And in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), this Court in addressing the issue of impartiality in the judiciary stated:

> Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a **neutral and detached judge in the first instance**. Id. at 61, 62. Emphasis added.

The *Forsyth* Court, following *Cohen*, held that "section 1291 must be given a 'practical rather than a technical construction.'" *Forsyth* at 1207.

> Under the *Cohen* collateral order doctrine, appellate courts have jurisdiction over orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the

> cause itself to require that appellate consideration be deferred until the whole case is adjudicated. Id. at 546, 69 S.Ct. at 1225-1226. *Forsyth* at 1207.

In applying this standard to the application of the jurisdictional interpretation to be given to § 1291, the *Forsyth* Court found that "[t]he District Courts' denials of the defendants' motions for summary judgment on absolute immunity must be analyzed under these three standards." The standards are:

> To be appealable a district court's order must 1) conclusively determine the disputed question; 2) resolve an important issue completely separate from the merits of the action; and 3) be effectively unreviewable on appeal from a final judgment. Id. at 1207.

The *Forsyth* Court continued to follow prior cases by referring to *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). The *Abney* Court focussed on the fact "that the District Court's decision involved an important right which would be lost if appellate review had to await adjudication on the merits." *Forsyth* at 1207.

Similarly in the underlying case before the District Court, the determination that certain defendants are immune precludes any further adjudication on the merits of the case, regardless of whether the Court's ruling is correct. Such a ruling effectively terminates the litigation against those parties deemed to be immune.

Under the three requirements presented in *Cohen*, the disputed question of immunity has been "conclusively determined;" the issue to be resolved is "completely separate from the merits;" and the matter will be "effectively unreviewable on appeal from a final judgment," since certain defendants will not be available to answer the allegations made against them regarding, discriminatory practices, violations of rights protected under the United

States Constitution and Federal Law. On this issue, the District Court's determination is a "final order."

Further in this Third Circuit Court of Appeals Case, the *Forsyth* Court referred to as authoritative the case of" *Briggs v. Goodwin*, 186 U.S.App.D.C. 179, 569 F.2d 10 (1977) (Wilkey, J. writing for the majority on the issue of appealability), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978)." Id. at 1208. Again, the authority relied upon by this D.C. Appellate Court (where an issue was "the doctrine of quasi-judicial immunity") was *Cohen*.

> In finding appellate jurisdiction the court, also stressing the third of the three *Cohen* criteria, noted that the purpose of absolute immunity is "as much to protect the relevant persons from a trial on their actions as it is to protect them from the outcome of trial." Id. at 59. *Forsyth* at 1208.

The test that appeared to have been formulated in *Abney*, supra, was:

> ..."whether the relevant rights that were the subject of the pretrial order would be 'significantly undermined' if appellate review had to await final action in the case." Id. [at 59]. See also McSurely v. McClellan, 172 U.S.App.D.C. 364, 521 F.2d 1024, 1032 (1975), en banc, 180 U.S.App.D.C. 101, 553 F.2d 1277 (1976), cert. dismissed as improvidently granted, 438 U.S. 189, 98 S.Ct. 3116, 57 L.Ed.2d 704 (1978) (on appeal from denial of motion to dismiss for absolute immunity under the Speech & Debate Clause, **"the question of appealability does not turn on the correctness of an appellant's claim[s]"**). *Forsyth* at 1208. Emphasis added.

Here as is described in the *Forsyth* case, the main focus

of the collateral order doctrine is to "prevent the loss of rights merely because appellate review is delayed until the litigation has run its full course in the lower court." Id. The District Court's decision precludes rights under the Fifth Amendment Due Process Clause, see DCMO page 6 in App. B, and is therefore a "final decision."

In *Adarand,* supra, the Supreme Court held that the Equal Protection component of the Fifth Amendment's Due Process Clause is violated where the Government uses a race-based presumption. The significance of this decision is that although enumerated many times before, it became clear, if not so before, that the application of due process and equal protection applies with equal force to the Federal Government as well as the States.

The *Adarand* Court in referring to *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954) stated:

> . . . *Bolling* then concluded that, "[i]n view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." Id., at 500. *Adarand* at 115 S.Ct. 2107.

The *Forsyth* Court again referred to *Briggs*, supra, stating:

> [s]ince the **discretion of the trial judge** whether to certify is itself unreviewable, the value of immediate review in the "small class" of cases where it is warranted under the collateral order doctrine could be irretrievably lost if [the] view that denial of certification *per se* bars interlocutory review were to prevail. 569 F.2d at 60. *Forsyth* at 1208. Emphasis added.

Although *Forsyth* addresses the immunity position of federal officials, the *Forsyth* Court did not allow absolute

immunity, "when a federal law enforcement officer is charged with constitutional violations." Id. at 1216. However, the Court stated:

> . . . if they knew or should have known that their actions were violating the plaintiffs' constitutional rights, then they will not be allowed to hide behind the cloak of institutional loyalty. Id. at 1217.

Constitutional violations were at issue in the underlying case before the District Court, which require more than a proclamation by judicial fiat that the facts in the present case entitle parties to the action "absolute immunity" for alleged violations of Constitutional and Federal Law through discriminatory practices. This determination is a "final decision."

In *Tabron v. Grace*, 6 F.3d 147, 154, n.3 (3d Cir. 1993), the Court of Appeals for the Third Circuit again referred to *Cohen* with reference to "appellate jurisdiction." Then in *Pas v. Travelers Ins. Co.*, 7 F.3d 349, 352 (3d Cir. 1993), the Appellate Court refers to *Cohen* on the issue of appellate jurisdiction. And again in *Transtech Industries, Inc.* v. A & Z Septic Clean, 5 F.3d 51, 56 (3d Cir. 1993), the Appellate Court makes reference to *Cohen* regarding its application and clarification of the final judgment rule of § 1291. See also *Melo v. Hafer*, 13 F.3d 736, 741 (3d Cir. 1994); and *Federal Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1280-81 (3d Cir. 1993).

This Court's decision in *Digital*, supra, reinforces prior Supreme Court and other Court decisions on the construction to be afforded the appellate jurisdictional provisions of § 1291, in addition to reinforcing the *Cohen* interpretation:

> The words of § 1291 have long been construed to recognize that certain categories of pre-judgment decisions exist for which it is both justifiable and necessary to depart from

> the general rule, that "the whole case and every matter in controversy in it [must be] decided in a single appeal." *McLish v. Roff*, 141 U.S. 661, 665-666, 12 S.Ct. 118, 119-120, 35 L.Ed. 893 (1891). *Digital*, 114 S.Ct. at 2004.

This decision provides guidelines for appellate review such as a "compelling public policy rationale" Id. at 114 S.Ct. at 1995;

". . . section 1291 requires courts of appeals to view claims of a **'right not to be tried' with skepticism, if not a jaundiced eye**." Id. at 1999;

> [i]n still other cases, see *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), an erroneous district court decision will, as a practical matter, sound the 'death knell' for many plaintiffs' claims that might have gone forward if prompt error correction had been an option. *Digital*, 114 S.Ct. at 1998.

In the *Digital* opinion, this Court recognized § 1291 to applications involving the Eleventh Amendment:

> See also *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. ___ , 113 S.Ct. 684, 121 L.Ed.2d 605 (State's Eleventh Amendment immunity from suit in federal court may be **vindicated** by immediate appeal under section 1291). *Digital*, 114 S.Ct. at 1997. Emphasis added.

In both *Murchison* and *Ward*, supra, this Court addressed the issue of a fair tribunal. The Third Circuit Court of Appeals decision based on *Borelli* does not rise to this level. Furthermore, *Borelli* is fundamentally in conflict with *Cohen*, *Digital*, *McLish*, and other authority cited above, and must not be allowed to overturn settled law and be determinative of the basis for appellate review

under 28 U.S.C. § 1291.

B. The Petition Should Be Granted To Review the Applicability of The Doctrine of Stare Decisis

The legal principle of "stare decisis" was discussed in the section above with respect to a deviation from an accepted legal interpretation of a federal statute. In a text on Civil Procedure by James, Hazard, and Leubsdorf,[2] the authors state:

> The doctrine of *stare decisis* is a mandate that courts should give due weight to precedent. It holds that an already established point of law should be followed without reconsideration, provided that the earlier decision was authoritative. . . .
> Stare decisis has been described as "of fundamental importance to the rule of law"[3] because it insures that the law does not change erratically and "permits society to presume that bedrock principles are founded in the law rather than in the **proclivities of individuals**."[4] Departure from precedent is said to require special justification,[5] and still

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[2]Fleming James, Jr., Geoffrey C. Hazard, Jr., and John Leubsdorf, *CIVIL PROCEDURE* (4th ed. 1992).

[3]*Welch v. Texas Dept. of Highways and Pub. Transp.*, 483 U.S. 468, 494, 107 S.Ct. 2941, 2957, 97 L.Ed.2d 389, 410 (1987).

[4]*Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 625, 88 L.Ed.2d 598, 610 (1986).

[5]*Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed. 2d 164 (1984).

> a greater burden must be borne by a party seeking to **overrule a point of statutory construction**.[6] On occasion, however, the Supreme Court has abandoned constitutional interpretations it concludes erroneous. Id. at 585. Emphasis added.

Based on the authority cited regarding the statutory construction that has been given to the "final order" provisions of § 1291, and the long history of the recognized exceptions, the doctrine should be applied in the case before this Court.

This Court recently discussed the doctrine of *stare decisis* in the case of *United States v. Gaudin*, supra, in which the court expressed the importance of *stare decisis* in our jurisprudence. The Court also stated that its application in procedural matters was "somewhat reduced," and that subsequent decisions proving the principle of law erroneous could not make the principle controlling under *stare decisis*. Id. at 115 S.Ct. 2319.

Then in 1995, this Court held in *Hubbard v. United States*, 115 S.Ct. 1754 (1995):

> It is, of course, wise judicial policy to adhere to rules announced in earlier cases. As Justice Cardozo reminded us, "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. Cardozo, The Nature of the Judicial Process 149 (1921). Adherence to precedent also serves **an indispensable institutional role within the**

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[6]*Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989).

had gone before him." B. Cardozo, The Nature of the Judicial Process 149 (1921). Adherence to precedent also serves **an indispensable institutional role within the Federal Judiciary**. Stare decisis is "a basic self-governing principle within the **Judicial Brar :h**, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon **'an arbitrary discretion**.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989) (quoting The Federalist No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)). See also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. ___, ___, 112 S.Ct. 2791, 2808-2809, 120 L.Ed.2d 674 (1992)(joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). 115 S.Ct. at 1763. Emphasis added.

The issue of jurisdiction under § 1291 cannot be resolved differently than that in *Cohen*, *Digital*, *McLish*, and the other cases cited above. The decision in *Hubbard* leaves little doubt that the Judicial Branch, especially the Federal Judiciary, is committed to the principle of *stare decisis*.

C. The Petition Should Be Granted To Review The District Court's Abuse Of Discretion in Providing Immunity For Violations of the United States Constitution And Federal Law

In *Collins v. City of Harker Heights, Tex.*, 503 U.S. 515, (1992), this Court held that:

The First Amendment, the Equal Protection

> and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the government as well as those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgement of those protections. 112 S.Ct. at 1065-66. Emphasis added.

Similarly, this Court has ruled that Federal Agents are liable for violations of Constitutional rights while acting under the color of their authority. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). And again, this Court has recently affirmed the status of the Due Process and Equal Protection provisions of the Fifth Amendment of the Constitution to be coexistent with those found in the Fourteenth Amendment. See *Adarand v. Pena, supra*.

The District Court has abused its discretion by dismissing a complaint against the officers and officials of the Equal Employment Opportunity Commission for discriminatory practices in the processing of equal employment opportunity complaints. See page 6 of DCMO in App. B.

In *Schlup v. Delo*, 115 S.Ct. 851 (1995), this Court held that because an improper standard of review was used, further proceedings were required. Id. at 115 S.Ct. 869. In arriving at this determination, this court made reference to *Agosto v. INS*, 436 U.S. 748, 756, (1978):

> ("a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) ("at the summary judgment stage the judge's function is not himself to weigh the

evidence and determine the truth of the matter but to **determine whether there is a genuine issue for trial**.") *Schlup*, 115 S.Ct. at 869. Emphasis added.

The issue as to whether an official is entitled to "absolute immunity" depends on a determination of fact. See *Forsyth v. Kleindienst, supra*. The Fourteenth Amendment is directed at enforcement against State action. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, (1976); Federal Agents acting under color of federal authority, see *Bivens v. Six Unknown Named Agents, supra*; Attorney General is not absolutely immune for acts allegedly unconstitutional, *Mitchell*, supra; "the Eleventh Amendment provides no shield for a state official **confronted by a claim** that he had deprived another of a federal right under the color of state law." See *Scheuer v. Rhodes*, 416 U.S.232, 237 (1974). This Court in *Scheuer* further stated:

> Analyzing the complaints in light of these precedents, we see that petitioners allege facts that demonstrate they are seeking to impose **individual and personal liability** on the *named defendants* for what they claim-but have not yet established by proof-was a deprivation of federal rights by these defendants under color of state law. Whatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, **given the favorable reading required by the Federal Rules of Civil Procedure** are not barred by the Eleventh Amendment. Id. at 238. Emphasis added.

This Court in *Adarand*, supra, noted parenthetically:

> (We note, incidentally, that this case concerns only classifications based explicitly on race, and presents none of the additional

difficulties posed by laws that, **although facially race neutral, result in racially disproportionate impact** and are motivated by a **racially discriminatory purpose**. See generally *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)). Id. at 115 S.Ct. 2105. Emphasis added.

The District Court's discussion of *In Re LiVolsi*, 428 A.2d 1268 (1981), touches on another issue presented in the underlying action regarding the Constitutionality of a facially neutral law and discriminatory applications. See *Adarand v. Pena*, supra, *In Re Murchison, supra*, and *Ward v. Village of Monroeville, supra*. The District Court has concluded that:

> . . . even if the constitutional entitlements alluded to here were impaired, that impairment is easily justified by the important public interests served by the fee arbitration system. *In re LiVolsi*, 85 N.J. 576, 598-604 (1981). See DCMO page 13 in App. B.

This Court in *Livadas v. Bradshaw*, 114 S.Ct. 2068 (1994) provided a basis under which the Equal Protection and Due Process Clauses operate in conjunction with the Supremacy Clause by stating:

> The power to tax is no less the power to destroy, McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819), merely because a state legislature has an undoubtedly **rational and "legitimate" interest in raising revenue**. In labor pre-emption cases, **as in others under the Supremacy Clause**, our office is not to pass judgment on the reasonableness

> of state policy, see, *e.g.*,*Golden State I*, 475 U.S. 608, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986) . . . It is instead to decide if a **state rule conflicts with or otherwise "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal law**. *Brown v. Hotel Employees*, 468 U.S. 491, 501, 104 S.Ct. 3179, 3185, 82 L.Ed.2d 373 (1984) . . . 114 S.Ct. at 2076. Emphasis added.

The District Court does not say whether an examination has been made of *LiVolsi* relative to the facts of this case.

The District Court characterizes the action of the Equal Employment Opportunity Commission defendants as "an erroneous decision." See DCMO page 4 in App. B. Whether this "erroneous decision" rises to the level of liability is a question of fact. But however euphemistically characterized, it is wrongful conduct. The Fifth Amendment provides a legal remedy for wrongful conduct in violation of the protections afforded in the Equal Protection and Due Process Clauses. Under the District Court's decision, this allegation was not worthy of inquiry.

> Implicit in the system of government [the framers] designed is the basic premise that unchecked power in any hands whatsoever is intolerable. *The Good Judge*, Report of the Twentieth Century Fund Task Force on Federal Judicial Responsibility (1989)[7]

This Court in *Shelley v. Kraemer*, 334 U.S. 1 (1947) stated:

> Since the decision of this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), the principle has become firmly embedded in our

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[7]Alpheus T. Mason, *Myth and Reality in Supreme Court Decisions*, 48 Virginia L. Rev. 1385, 1405 (1989)

constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. Id. at 13. . . . That action of **state courts and judicial officers in their official capacity is to be regarded as action of the State**, within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. . . . Thus, in *Virginia v. Rives*, 100 U.S. 313, 318 (1880), this Court stated: "It is doubtless true that a State may act through different agencies, - either by its legislative, its executive, or its judicial authorities; and these prohibitions of the amendment **extend to all action of the State denying equal protection of the laws, whether it be an action by one of these agencies or by another**." In *Ex parte Virginia*, 100 U.S. 339, 347 (1880), the court observed: "**A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way**." In the *Civil Rights Cases*, 109 U.S. 3, 11, 17 (1883), this Court pointed out that the Amendment makes void "**State action of every kind**" which is inconsistent with the guaranties therein contained, and extends to manifestations of "State authority in the shape of **laws, customs, or judicial or executive proceedings**." Language to like effect is employed no less than eighteen times during the course of that opinion [reference to footnote citation is omitted].

Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action of the State for the

> purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided. In *Twining v. New Jersey*, 211 U.S. 78, 90-91 (1908), the Court said: "**The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State**." In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930), the Court, through Mr. Justice Brandeis, stated: "**The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government**." Further examples of such declarations in the opinions of this Court are not lacking [reference to footnote citation is omitted]. Id. at 14, 15. Emphasis added.

This case not only defines the state requirements under the Fourteenth Amendment, but by reference includes the state's prohibitions with reference to Civil Rights Cases.

In *Goeke v. Branch*, 115 S.Ct. 1275 (1995), this Court exercised "its supervisory power to administer the federal court system." Id. at 1277. Petitioner prays that this Court will again intervene to preserve Constitutional, Federal, and fundamental rights granted by law, as provided for in United States Supreme Court Rule 10(a).

Under the authority provided within this section and elsewhere in this petition, this case should be heard.

CONCLUSION

The Court of Appeals for the Third Circuit has directly confronted this Court on the issue of appellate review. The petition should be granted to reinforce long standing legal principles which extend back at least to *McLish* in 1891 regarding the controlling jurisdictional construction to be given to 28 U.S.C. § 1291, and to reinforce the judicial policy of *"stare decisis."*

DATED: December 20, 1995

Respectfully submitted,

JAMES A. GHENT, JR.
Counsel of Record

ROY W. KING
Of Counsel
Attorneys for Petitioner

APPENDIX

DPS-6 July 13, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
C.A. No. 95-5405

JAMES A. GHENT, JR.
vs.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
(D.N.J. CIV. No. 94-CV-05759)

Present: HUTCHINSON, NYGAARD and LEWIS, CIRCUIT JUDGES

Submitted are:

(1) By the Clerk for possible dismissal due to a jurisdictional defect;

(2) Appellant's jurisdictional response;

(3) Appellee's jurisdictional response; and

(4) Appellant's supplemental jurisdictional response in the above-captioned case.

Respectfully,

/s/ P. Douglas Sisk/WMH
Clerk

PDS/WMH/zm

ORDER

The foregoing appeal is dismissed for want of jurisidiction, because it is taken from a non-final order. 28 U.S.C. § 1291. See Borelli v. City of Reading, 532 F.2d 950 (3d Cir. 1976).

By the Court,

/s/ William D. Hutchinson
Circuit Judge

Dated: Jul 25, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JAMES A. GHENT, JR.,

Plaintiff,

v.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Defendants.

Civil Action No. 94-5759

ORDER

In accordance with the Court's Memorandum Opinion filed herewith,

It is on this 17 day of April, 1995,

ORDERED that defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b) (6) is granted; and it is further

ORDERED that the complaint is dismissed without prejudice.

/s/ Alfred M. Wolin, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JAMES A. GHENT, JR.,

Plaintiff,

v.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Defendants.

Civil Action No. 94-5759

MEMORANDUM OPINION

This matter is opened before the Court upon the motions of defendants the Equal Employment Opportunity Commission, the State of New Jersey, the Supreme Court of New Jersey, the Supreme Court's Committee on Fee Arbitration and officials of these bodies to dismiss the complaint against them for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b) (6). The motions have been decided upon the written submissions of the parties pursuant to Federal Rule of Civil Procedure 78. For the reasons given below, the motions will be granted and the complaint dismissed.

BACKGROUND

The Court has assumed the truth of the factual allegations of the complaint as supplemented by the documents attached thereto.[1] This action has its origin in

[1] The Court may consider documents such as these on a motion to dismiss without converting the motion to one for summary judgment where they are attached to the complaint and form the basis of the action. Fed. R. Civ. P. 10(c); Pension Benefit Guaranty Trust v. White Consolidated Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993), cert.

a dispute over attorney's fees between plaintiff, an attorney, and former clients of his. Plaintiff represented the clients, his relatives, in a boundary dispute from 1991 to 1993. At the conclusion of the case, plaintiff claimed that his clients owed him over $72,000. The matter came before the defendant Supreme Court of New Jersey's Committee on Fee Arbitration (the "Committee"). The Committee found that the clients believed that they were operating under a contingency fee arrangement. Ultimately, the Committee awarded plaintiff $7,500 in light of the substantial services he had performed for his clients.

Disappointed in the outcome of the arbitration, plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") claiming that he was the victim of employment discrimination by the Committee, in violation of Title VII of the United States Code. Plaintiff is an African-American. The EEOC dismissed the complaint on the ground that there was no employment relationship between the plaintiff and the Committee.

In the complaint at bar, plaintiff has named the EEOC and various of its officials, the State of New Jersey, the Committee and Committee members in both their official and individual capacities. Against the EEOC, plaintiff alleges that the dismissal of his complaint was "wanton, willfull and reckless" discrimination in violation of the Civil Rights Act, 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986, Title VII, 42 U.S.C. §§ 2000e et seq., the Rehabilitation Act, 29 U.S.C. § 794, and the Due Process clause of the Fifth Amendment of the United States

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denied, 114 S. Ct. 687 (1994).

Constitution. Because the EEOC failed to act in his case, plaintiff claims that its receipt of government funds constitutes a taking of his taxes under the Fifth Amendment. Plaintiff also claims that the EEOC is liable to him in tort under the Federal Tort Claims Act, 28 U.S.C. § 2867 et seq.

The complaint against the Committee assigns various errors to its decision and claims that these errors constitute violations of his civil rights. Plaintiff asserts causes of action under the Equal Protection and Due Process clauses of the Fourteenth Amendment; under the Thirteenth Amendment because the reduction of his fee constitutes the imposition of slavery and involuntary servitude; Title VII because the decision had a disparate impact on him and established a racially oppressive condition of employment; the Fifth Amendment because the discounting of his fee constitutes a taking under the Fifth Amendment; and Article I, Section 10 of the Constitution because the arbitration impaired his contract rights. He also asserts that these violations give him causes of action under 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986.

DISCUSSION

On a motion to dismiss under Rule 12(b) (6), the Court must accept as true all allegations in the complaint, and provide the plaintiff with the benefit of all inferences which fairly may be drawn from the complaint. Wilson v. Rackmill, 878 F.2d 772, 775 (3d Cir. 1989). A complaint cannot be dismissed unless the Court is certain that no set of facts can be proved that would entitle plaintiff to relief. Id.; Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Nonetheless, even a cursory perusal of the complaint in

this matter reveals that the facts as alleged create no cause of action in favor of plaintiff.

1. The Complaint Against the EEOC

Title VII, 42 U.S.C. § 2000e et seq. creates an administrative remedy and a cause of action for employees who have been discriminated against in the workplace. It does not give disappointed complainants before the EEOC a right to sue for an erroneous decision by the Commission, because the alleged harm would not have occurred in the context of employment. Ward v. Equal Employment Opportunity Comm'n, 719 F.2d 311, 313 (9th Cir. 1983), cert. denied, 466 U.S. 953 (1984). The remedy for such error is a new action in federal court against the complainant's employer. Id.

Plaintiff claims that he has a cause of action under 42 U.S.C. 2000e-6. This part of Title VII provides that the EEOC or the Attorney General may file suit on its own behalf or on behalf of an aggrieved person against anyone who "is engaged in a pattern or practice of resistance to the full enjoyment of any of the [Title VII] rights." Plaintiff cites an opinion of the EEOC in which the commission held that the quoted passage broadened jurisdiction in the commission to bring a civil suit for discriminatory activities affecting employment beyond those within an strict employer-employee relationship. EEOC Decision 87-2, 1987 WL 68471 (August 31, 1987) (discriminatory activity by state electrician licensing agency within ambit of § 2000e-6).

In the abstract, there might be a colorable argument that an arbitrator could engage in a "pattern or practice of resistance," because one need not be an employer of one

whose Title VII rights are injured to be liable under § 2000e-6. See United States v. Board of Educ., 911 F.2d 882, 892 (3d Cir. 1990) (state potentially liable under §2000e-6 for enforcing statute prohibiting teachers from wearing religious clothing against a Muslim teacher employed by city). However, even assuming for the sake of argument that this proposition means that the Committee is subject to suit by the EEOC, it has no bearing on plaintiff's case. Section 2000e-6 creates power in the EEOC or the Attorney General to bring suit. It does not create a right in a disappointed cliamant to sue the Commission when it decides not to act. Moreover, the statute clearly gives the EEOC and the Attorney General discretion; they "may" bring suit "as [they] deem[] necessary." 42 U.S.C. § 2000e-6(a).[2]

The existence of a complainant's option to bring his case into federal court causes two of plaintiff's other claims to fail as well. Because Congress has provided an alternative remedy, the EEOC does not finally adjudicate the rights of any employee. Francis-Sobel v. University of Maine, 597 F.2d 15, 17 (1st Cir.), cert. denied, 444 U.S. 949 (1979). Therefore, plaintiff cannot claim under 42 U.S.C. §1981 that the EEOC has deprived the him of the equal protection of the laws. Kuser v. Equal Employment Opportunity Comm'n, 1978 WL 181, 18 Fair Empl. Prac.

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[2] Plaintiff argues that his status as a taxpayer means he can sue to force the EEOC to perform what he believes to be its mandate in this case. The well-known bar to standing to bring suit based on generalized grievances forecloses this argument. United States v. Richardson, 418 U.S. 166, 172-74 (1974). He also claims that the receipt of his tax funds without provision of the "service" to which he claims entitlement constitutes a taking under the Fifth Amendment. The Court is satisfied that generally applicable taxes are constitutional regardless of how the government spends them.

Cas. (BNA) 1011 (D. Md. 1978). Nor can the Commission deprive a complainant of a liberty or property interest protected by the Fifth Amendment, because it does not make a binding determination of the claimant's rights. See Hannah v. Larche, 363 U.S. 420, 440-42 (1960).

The other claims under the Civil Rights statute are also without merit. It is beyond dispute that a Title VII violation cannot form the basis of a claim under 42 U.S.C. § 1985. Great Am. Federal Savs. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981). Because a § 1986 violation depends on a predicate § 1985 violation, plaintiff's claim under this section fails as well. Moreover, the EEOC, as an arm of the federal government, is not a "person" liable to suit under § 1985 or § 1986. See Community Brotherhood of Lynn, Inc. v. Lynn Redevelopment Auth., 523 F. Supp. 779, 780-81 (D. Mass. 1981).[3]

Others of plaintiff's claims are invalid on the face of the laws under which they are raised. Title 42 U.S.C. § 1982 concerns interference with the transfer of real or personal property, not employment discrimination claims. Johnson v. Duval Co. Teachers Credit Union, 507 F. Supp. 307, 310 (M.D. Fla. 1980). Section 1983 only addresses actions taken under color of state law. The Rehabilitation

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[3] EEOC has cited the Third Circuit case of Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971), cert. denied, 404 U.S. 1061 (1972), for the proposition that federal officials acting under color of federal law are immune from suit under 42 U.S.C. § 1985. It has been pointed out Bethea's holding may not be consistent with Griffin v. Breckenridge, 403 U.S. 88, 96 (1971). Ogden v. United States, 758 F.2d 1168, 1175 n.3 (7th Cir. 1985). In light of the several grounds available for dismissing the complaint against them, the Court need not rely on Bethea with regard to the defendant federal officials.

Act, 29 U.S.C. § 794, applies only to handicapped persons deprived of participation in federally funded programs. Plaintiff has falsely stated that it also applies to discrimination based on "race, color," etc. It does not.

As the foregoing discussion suggests, plaintiff's claim under the Federal Tort Claims Act, 28 U.S.C. § 1346 fails because he has suffered no legally cognizable harm from the EEOC. Besides the authorities already disposed of, plaintiff has not alleged what the source of any duty owed him by the EEOC might be. Moreover, plaintiff has failed to allege that he filed a claim with the agency stating how he had been harmed by the agency, and that the claim was denied.[4] See 28 U.S.C. §§ 2401(b), 2674; see also National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1236 (3d Cir. 1980) (administrative claim must contain a sum certain), vacated on other grounds, 453 U.S. 1 (1981). Therefore his claim under the Tort Claims Act is not properly before the Court. Id.

The Court has confined itself to the discussing the most serious flaws in plaintiff's case. Others clearly exists, for example, it appears from the docket of the Clerk of the Court that the individually named EEOC officials were never validly served. In the name of judicial economy, the Court will not catalog all of these deficiencies.

2. The Complaint against the Supreme Court of New Jersey's Committee on Fee Arbitration

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[4] The original complaint against the Committee does not constitute such a claim, because it concerned a harm plaintiff claims he received from a third party.

This would seem the more substantial branch of the case, as it invokes this Court's original jurisdiction over claims of employment discrimination directly against the persons alleged to have engaged in the discriminatory acts. This appearance is illusory, however.

Judicial officers enjoy an absolute immunity from suit for judicial acts taken in their official capacity. This immunity extends even to judicial acts that are alleged to have violated a party's civil rights, as long as they are within the officer's jurisdiction. Pennebaker v. Chamber, 437 F.2d 66, 67 (3d Cir. 1971). Judicial immunity extends to boards, committees and court employees to whom judicial discretion has been delegated. See Sparks v. Character and Fitness Committee, 859 F.2d 428, 430-32 (6th Cir. 1988), cert. denied, 489 U.S. 1011 (1989); Henig v. Odorioso, 385 F.2d 491, 494 (3d Cir. 1967), cert. denied, 390 U.S. 1016 (1968); Akins v. Deptford Township, 813 F. Supp. 1098, 1102-03 (D.N.J.), aff'd, 995 F.2d 215, cert. denied, 114 S. Ct. 478 (1993). The Fee Arbitration Committee established by the New Jersey Supreme Court is a judicial or quasi-judicial body and enjoys the immunity. Kanengiser v. Kanengiser, 248 N.J. Super. 318, 333, 590 A.2d 1223, 1231 (Law Div. 1991).

Here, there is no allegation that the Committee or any of its members acted outside their jurisdiction. As far as the Court can discern, the gravamen of this action is that the Committee disagreed with plaintiff's argument as to the fee he was owed. Of course, this is the very purpose for which the Committee was formed and its jurisdiction was created.

Here again, other obstacles prevent plaintiff from stating a claim. For example, the claims for damages

under 42 U.S.C. § 1981 et seq., against the State of New Jersey and the Committee as an entity are barred by the Eleventh Amendment to the Constitution. Quern v. Jordan, 440 U.S. 332 (1979); Grabow v. Southern State Correctional Facility, 726 F. Supp. 537, 538 (D.N.J. 1989); McNeil v. McDonough, 515 F. Supp. 113, 122 (D.N.J. 1980), aff'd, 648 F.2d 178 (3d Cir. 1981).

The direct Title VII claim against the State of New Jersey is not barred by the Constitution. Fitzpatrick v. Bitzer, 427 U.S. 445, 454-56 (1976). The argument fails on it merits, however. Obviously, plaintiff is not employed, nor has he ever sought employment by the Committee. It must be allowed that a strict employment relationship is not necessary in every Title VII case. Where a third party interferes with protected rights, it may be liable under the statute. For example, a worker at a factory cafeteria was able to sue the factory owner for sexual harassment even though she was employed by a concessionaire and not by the owner. King v. Chrysler Corp., 812 F. Supp. 151 (E.D. Mo. 1993). By the terms of the statute, employment agencies are subject to Title VII suits by persons they refer to employers, even though no employment relationship exists between the parties. 42 U.S.C. §§ 2000e(c), 2000e-2(b).

However, even where a third party has been sued under Title VII, there is still an employment relationship at the heart of the case. Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1159 (5th Cir. 1986) ("[c]ourts, logically enough, consistently hold that Title VII contemplates some employment relationship"); King, 812 F. Supp. at 153 ("plaintiff must have an employment relationship with some entity"). There is no such relationship anywhere in this case. Plaintiff's dispute before the Committee was in

the nature of a suit on an account for services rendered.

The Court is convinced that under any appropriate test, the attorney/client relationship is not one of employee to employer, but independent contractor to promisor.[5] See Equal Employment Opportunity Comm'n v. Zippo Mfg. Co., 713 F.2d 32, 36-38 (3d Cir. 1983) ("hybrid right to control and economic realities standard is the proper test of employee status for the purposes of Title VII").[6] Accordingly, the case before the Committee was more closely akin to a garden-variety contract dispute, notwithstanding plaintiff's attempt to re-characterize it as discrimination over wages.

In any event, because plaintiff was never an employee of his clients within the meaning of Title VII, racial discrimination in connection with his fee cannot state a claim under that statute. Independent contractors are not protected by Title VII. Wilde v. County of Kandiyohi, 15 F.3d 103, 104 (8th Cir. 1994). Moreover, plaintiff's argument compares unfavorably to cases that have held

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[5] This proposition has nothing to do with the issue of an attorney's relationship with a law firm that might employ her.

[6] Recently, courts have suggested that Nationwide Mut. Ins. Co. v. Darden, 112 S.Ct. 1344, 1348 (1992) has abrogated Zippo Mfg's test for employment under Title VII. Frankel v. Bally, Inc., 987 F.2d 86, 90 (2d Cir. 1993); Cox v. Master Lock Co., 815 F. Supp. 844 (E.D. Pa.), aff'd, 14 F.2d 46 (3d Cir. 1993). Darden held that where Congress has not explicitly defined "employment" in a federal statute, the courts should apply a common-law agency test. This Court need not reach the issue of whether Darden states a rule for determining employment under Title VII, because the facts here do not rise to employment even under the more liberal Zippo Mfg. standard.

state licensing bureaus to be immune from Title VII as a proper exercise of a state's police powers. E.g., George v. New Jersey Bd. of Veterinary Medical Examiners, 794 F.2d 113 (3d Cir. 1986). In licensing, the opportunity for employment is far more closely implicated than in the adjudication of fee disputes.

Others of plaintiff's allegations are mysterious. For example, plaintiff complains that he was harassed by the Bar Examiners of the State of Connecticut when they inquired into the pending fee arbitration while evaluating his application for admission in that state. Plaintiff also protests the ruling of the Committee that his client waived the confidentiality of the proceedings. The Court does not believe these allegations further plaintiff's cause. Except for holding that they do not state a claim, the Court will not consider them further.

Plaintiff's claims directly under the Constitution merit little comment. The constitutionality of the fee arbitration system was upheld in Guralnick v. Supreme Court of New Jersey, 747 F. Supp. 1109 (D.N.J. 1990), aff'd, 961 F.2d 209 (3d Cir. 1992). By allowing an adversarial procedure, with the opportunity to present evidence and testimony, the Committee affords ample process of law to attorneys and clients alike before adjudicating the rights of any. Id. at 1113. Plaintiff's Thirteenth Amendment claim fails because the adjudication of a fee does not constitute involuntary servitude even though the fee is reduced. Id. at 1116-17. Among other reasons, Article I, Section 10 of the Constitution is irrelevant here because the Committee did not impair a contract obligation but rather made a quasi-judicial determination of what the obligation was. See id. at 1115. In any case, even if the constitutional

entitlements alluded to here were impaired, that impairment is easily justified by the important public interests served by the fee arbitration system. Id.; In re LiVolsi, 85 N.J. 576, 598-604 (1981).

As to any claim that the law requiring fee arbitration is unconstitutional as applied to the plaintiff because of intentional racial bias on the part of the arbitrators, the remedy for this is not by collateral attack on the adjudication in the federal courts. New Jersey Rule of Court 1:20A-3 (c) provides for a limited avenue of appeal. An appeal on the merits is prohibited, but one may lie for failure of a member to be disqualified as provided under Rule 1:12-1, or if the Committee fails substantially to comply with the procedural requirements of Rule 1:20A, which in turn provides that the determination shall be made in accordance with Rule of Professional Conduct 1.5. Rule 1:20A-3(b) (1). Rule 1:12-1(f) provides that a judge shall be disqualified if the involvement of that officer might preclude a fair and unbiased hearing. Rule of Professional Conduct 1.5 mandates that fees be reasonable and specifies criteria for determining their reasonableness.

Either of these grounds are available to an attorney who believes that an arbitration was decided against him because of racial bias. The Court doubts that plaintiff can make out a case of intentional, selective discrimination in this case. Among other reasons, plaintiff's clients were his relatives and, therefore, presumably of the same race. Moreover, the complaint does not present the claim with sufficient particularity to satisfy even the relaxed pleading standards of the federal rules. In any event, it should be raised on appeal as provided by state law. Allegations of racial bias in a state adjudication do not give litigants a

license to make an end run around the appropriate channels of appellate relief by starting a new action in federal court.

3. Dismissal Without Prejudice

Dismissal on a motion under Federal Rule of Civil Procedure 12 is generally without prejudice. This is particularly appropriate where the plaintiff has attempted to state a claim under the Constitution or the Civil Rights Statutes. The breadth and importance of these protections mean that it is sometimes possible to redraft defective pleadings successfully, and no valid claim should be overlooked.

Therefore dismissal of this complaint will be without prejudice. The Court makes this decision with some trepidation, however. It appears from the face of the complaint that this action, as well as the complaint before the EEOC, are no more than attempts to collaterally attack the adverse determination of the Fee Arbitration Committee. This is not a proper purpose for filing charges of civil rights violations. Plaintiff is an attorney, yet the most elementary legal principles dictate that there is no legal basis for his claims. Plaintiff has mis-cited the law to this Court, and the Court has had occasion to reprimand plaintiff for another instance of lack of candor. See Letter of the Court dated March 2, 1995. The Court states here its displeasure at this type of conduct before it.

Plaintiff is warned, therefore, that any further pleadings based on the occurrences stated in the instant complaint will be scrutinized closely. The Court will not hesitate to enforce the terms of Federal Rule of Civil Procedure 11 where appropriate.

CONCLUSION

For the foregoing reasons, the motion to dismiss the complaint will be granted and the complaint will be dismissed without prejudice.

An appropriate Order is attached.

Dated: April 17, 1995

/s/ ALFRED M. WOLIN, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5405

JAMES A. GHENT, JR.,
Appellant

v.

U.S. EEOC; TONY E. GALLEGOS; GILBERT F. GALLEGOS; CORRADO GIGANTE; STATE OF NEW JERSEY; SUPREME COURT OF NEW JERSEY; ROBERT D. LIPSHER; FEE ARBITRATION COMMITTEE; ROBERT C. LA SALLE; MARY E. MARBAN; AND THOMAS ZICCARDI

(Caption amended per Clerk's 7/6/95 Order)

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Docket No. 94-cv-05759)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, Circuit Judges

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Richard L. Nygaard
Circuit Judge

DATED: Sep 26, 1995

Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

No. 95-1031

In the
Supreme Court of the United States
October Term, 1995

JAMES A. GHENT, JR.,

Petitioner,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TONY E. GALLEGOS, GILBERT F. CASELLAS, CORRADO GIGANTE, STATE OF NEW JERSEY, SUPREME COURT OF NEW JERSEY, ROBERT D. LIPSHER, FEE ARBITRATION COMMITTEE DISTRICT IX, ANTHONY BENEVENTO, ROBERT C. LASALLE, MARY E. MARBAN, THOMAS ZICCARDI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Third Circuit correctly applied Borelli v. City of Reading as controlling the scope of appellate review under 28 U.S.C. §1291.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

On November 29, 1994, Petitioner filed a civil rights complaint in the United States District Court in Newark, New Jersey alleging that the Fee Arbitration Committee of the Supreme Court of New Jersey violated his civil rights in failing to award him a fee to which he was entitled. The Petitioner argued that he was unlawfully discriminated

against in his employment by the Fee Arbitration Committee in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C §2000e.

Acting on a Motion to Dismiss filed by the Fee Arbitration Committee, which argued that the complaint failed to state a claim to which relief could be granted, the district court dismissed the complaint finding that the Fee Arbitration Committee was entitled to absolute immunity from liability, and moreover, that Petitioner had failed to establish any employment relationship as required for a Title VII claim. The court went on to note that the dismissal was without prejudice to the Petitioner's right to redraft the defective pleadings to state a valid claim.

SUMMARY OF ARGUMENT

Petitioner argues that this Court should grant his Petition for a Writ of Certiorari because the Third Circuit incorrectly relied on Borelli v. City of Reading, 532 F.2d 950 (3d Cir. 1976) in dismissing his appeal for want of jurisdiction because the district court Order was not a final/appealable order. Petitioner's argument is entirely lacking in merit and his petition should be denied.

Contrary to Petitioner's contention, Borelli is directly on point and clearly dispositive of the issue at bar. The Borelli opinion found that "an order which dismisses a complaint without prejudice is neither final nor appealable because the deficiency may be corrected by the plaintiff without affecting the cause of action. Only if the plaintiff cannot amend or declares his intention to stand on the complaint does the order become final and appealable." Borelli, 532 F.2d at 951. Moreover, neither the facts of this case nor the cases cited by the Petitioner support his argument that his particular case represents the "narrow" exception to this general rule.

Therefore, the Petition for a Writ of Certiorari should be denied.

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE THIRD CIRCUIT WAS CORRECT IN DISMISSING PETITIONER'S APPEAL FOR WANT OF JURISDICTION AND THERE IS NO COMPELLING REASON FOR FURTHER REVIEW BY THIS COURT.

Petitioner's challenges the Third Circuit's dismissal of his appeal for want of jurisdiction arguing that the appellate court incorrectly applied Borelli v. City of Reading, 532 F.2d 950 (3d Cir. 1976) as controlling the scope of appellate review under 28 U.S.C. §1291. Petitioner argues that the cases of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949), Digital Equipment Corp. V. Desktop Direct, Inc., __ U.S. __, 114 S.Ct. 1992 (1994) and Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979) are contrary to the Borelli decision and, therefore, he was entitled to appellate review of the district court's decision in the court of appeals. Petitioner's position is without merit.

Title 28 U.S.C. §1291 provides for appeals only "from all final decisions of the district courts." In Borelli, the district court dismissed the complaint finding that the plaintiff lacked standing because she did not articulate the harm she had suffered. The Court of Appeals for the Third Circuit noted that if the allegations in the complaint were not sufficient, the trial court could require more particularized allegations through amendment to the complaint. The Court of Appeals went on to note that, "Although the district court's order did not mention amendment, an implicit invitation to amplify the complaint is found in the phrase "without prejudice." Borelli, 532 F.2d at 951. The Court then stated the well established proposition that "an order which dismisses a complaint without prejudice is neither final nor

appealable because the deficiency may be corrected by the plaintiff without affecting the cause of action. Borelli, supra.

The case at bar is indistinguishable from Borelli. The Petitioner failed to allege with sufficiency the alleged employment relationship between himself and the Fee Arbitration Committee. The district court dismissed the complaint without prejudice with the implicit invitation to the Petitioner to amend his complaint. Consequently, the district court's decision was non-final and not appealable under 28 U.S.C. §1291. Therefore, the Third Circuit's dismissal of Petitioner's appeal was correct in all respects.

Petitioner's citations to Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949); Digital Equipment Corp. V. Desktop Direct, Inc., _ U.S. __, 114 S.Ct. 1992 (1994); and Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979), do not support his argument that his case represents the narrow exception to the general rule that only final orders are appealable.

In Cohen, the Supreme Court noted that if the dismissal of the appeal did not go to the merits of the case and that the rights conferred by the statute, if applicable, could have been irreparably lost, appellate review of a non-final order may be appropriate. The Court noted, however, that its decision falls within that "small class which finally determine claims of rights separable from, and collateral to, rights asserted in the action ... and too independent of the cause itself.." Cohen, 69 S.Ct. at 1225-6. Here, the dismissal by the district court did not go to the merits of the case and Petitioner's constitutional rights under Title VII would clearly not be irreparably lost. Moreover, the district court's decision did not determine claims separable and independent of the cause itself.

Therefore, Cohen and the present case are distinguishable and Cohen supports the Third Circuit's application of Borelli.

Petitioner's reliance on Digital and Forsyth is also misplaced. In Digital, the Court stressed that the narrow exception to the final order rule should remain narrow and never be allowed to swallow the general rule. The decision went on to note the stringent requirements of the collateral order rule. Digital Equipment Corp. 114 S.Ct. at 1996. The Court firmly noted that cases involving an important question which would be effectively unreviewable upon final judgment would be the only cases that fall into the narrow exception to the final order rule. Digital Equipment Corp. supra. Clearly, Petitioner's argument does not present any important questions which would be unreviewable upon final judgment. In Forsyth, the Third Circuit stresses that the Cohen collateral order doctrine requires claims of rights separable and independent from the rights asserted in the action. Forsyth, 599 F.2d at 1207.

Since Petitioner's argument neither presents nor represents any of the narrow exceptions cited above, his case falls squarely within the general rule that only final orders are appealable. Therefore, the Third Circuit correctly applied Borelli v. City of Reading and properly dismissed Petitioner's appeal for want of jurisdiction.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted,

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Dated: February 20, 1996.

Supreme Court, U.S.
FILED
MAR 1 1996

No. 95-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES A. GHENT, JR.,

Petitioner,

vs.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TONY E. GALLEGOS, GILBERT F. CASELLAS, CORRADO GIGANTE, STATE OF NEW JERSEY, SUPREME COURT OF NEW JERSEY, ROBERT D. LIPSHER, FEE ARBITRATION COMMITTEE DISTRICT XI, et al., ANTHONY BENEVENTO, ROBERT C. LASALLE, MARY E. MARBAN, THOMAS ZICCARDI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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NEW POINTS RAISED IN THE BRIEF IN OPPOSITION

1. Whether the Respondents are absolutely immune from liability for alleged invidious conduct which violates the Due Process Clause and the Equal Protection Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Whether a judicial determination of absolute immunity is a final order creating a right to immediate appellate review under 28 U.S.C. § 1291?

3. What constitutes a compelling reason for further review by the Supreme Court of the United States?

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In The
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vs.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; TONY E. GALLEGOS; GILBERT F. CASELLAS; CORRADO GIGANTE; STATE OF NEW JERSEY; SUPREME COURT OF NEW JERSEY; ROBERT D. LIPSHER; FEE ARBITRATION COMMITTEE DISTRICT XI, ET AL.; ANTHONY BENEVENTO; ROBERT C. LA SALLE; MARY E. MARBAN; THOMAS ZICCARDI,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

STATEMENT

The Respondents' Brief in Opposition is factually incorrect in the following instances:

1. The Petitioner has never stated that there currently exists or ever existed an employee-employer relationship with the Fee Arbitration Committee, as stated on pages 2 and 5 of Respondents' Brief.

2. The Respondents make a comparison between the present case and *Borelli* by suggesting that as a basis for dismissal "[this Petitioner] . . . did not articulate the harm [he] had suffered." See page 4 of Respondents' Brief. This is not the factual situation in the present case since Petitioner's Complaint articulates the property interest lost (wages from employment, etc.) in Count One of the Complaint, and other damages elsewhere in the Complaint.

The determination by the District Court that certain respondents are **absolutely immune** effectively forecloses any further adjudication against those parties even though the District Court's dismissal was without prejudice.

The term "without prejudice" may be used as a strategic judicial tool which can frustrate litigants attempting to seek a judicial remedy.

POINT I

Absolute Immunity: A Question Of Law And Fact

The Respondents' Brief in Opposition relies on the District Court's determination that they are absolutely immune. Whether absolute immunity rests with the Respondents is doubtful, and should be subjected to adjudication on the merits. *Mitchell v. Forsyth*, 427 U.S. 511 (1985).

The Third Circuit Court of Appeals addressed the issue of immunity in *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979) and held that absolute immunity has been granted to prosecutors in their decision to present a criminal action. The Appellate Court further stated that "federal officers are only entitled to qualified or good faith, immunity." Id. at 1216.

The *Forsyth* Court relied partially on *Butz v. Economou*, 438 U.S. 478 (1978) from which the Appellate Court related that the official claiming immunity has the burden to demonstrate "exceptional circumstances." No such showing was required by the District Court. Furthermore, the *Forsyth* Court ruled that qualified or "good faith" immunity would not apply where the actors knew or should have known of violations of the constitutional rights of an individual, such as violations of the Fifth and Fourteenth Amendments, as alleged in this case.

It would appear that the District Court is in violation of the Supremacy Clause.

Article VI of the United States Constitution (The Supremacy Clause) provides in pertinent part:

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State

> shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[1]

This Court has held that absolute immunity does not apply to Cabinet officers or other high officials. *Mitchell*, supra. See also *Harlow v. Fitzgerald*, 457 U.S. 800, 808, 102 S. Ct. 2727, 2723 (1982), *Nixon v. Fitzgerald*, 457 U.S. at 747, 102 S.Ct. at 2700 (1982). Constitutional rights are more than precatory, and litigants who take refuge in those rights must be able to rely on the courts for "the protection of their justiciable constitutional rights." *Davis v. Passman*, 442 U.S. 228, 242, 99 S. Ct. 2264, 2275 (1975).

In light of the above, the alleged invidious conduct of the Respondents must be judicially reviewed for a determination of law and fact.

POINT II

Absolute Immunity Is A Final Order

In *Mitchell*, supra, this Court addressed the issue of Immunity as a final order, as applied to the final order provisions of 28 U.S.C. § 1291 and concluded that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment." Id. at 472 U.S. 525. However, the Court recognized the exception where "the defendant's actions violated clearly established law and [were] therefore not within the scope of qualified immunity." Id. at 527. In this instance, as in the present

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[1]Lawrence H. Tribe, American Constitutional Law, Second Edition, (1988), xl.

case before the Court, the Respondents are not immune. Therefore, the issue of immunity should have been appealable under § 1291.

POINT III

Discriminatory Practices In Violation Of The United States Constitution Constitute A Compelling Reason For Further Review By This Court

The Respondents' Brief states that " . . . There is no compelling reason for further review by this Court." Id. at ii.

In American Constitutional Law, by Lawrence Tribe, the author discusses a fundamental right to equal litigation opportunity. Id. at 1461. In *Adarand v. Pena*, 115 S.Ct. 2097 (1995), this Court addressed the need for "detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed," where racial classifications are involved. Id. at 2112. And they also held that a prerequisite for racial classifications "serving a compelling government interest" is that it be "narrowly tailored to further that interest." Id. at 2117. Jurists who expressed an opinion within the Court's decision stated that provisions in the Constitution for equal protection of the law was the method by which discrimination should be remedied. The same issue of discriminatory practices appears in this case and therefore constitutes a compelling reason for further review by this court.

A state action that distinguished citizens by race to be "narrowly tailored to further a compelling governmental interest" was found in *Shaw v. Reno*, 113 S.Ct. 2816, 2825 (1993). Absent a compelling governmental justification,

inequalities in the administration of fundamental rights which bear on liberty, property, or other interests have been held unconstitutional. See Tribe, Constitutional Law, 1454. Other rights have been held to be fundamental "because of feared invidious discrimination." Id. at 1463. Compelling governmental interest is associated with equal protection strict scrutiny and has focussed on discrimination against "racial and ancestral groups." Id. at 1465.

CONCLUSION

This case presents compelling constitutional issues. Therefore, further review by this Court is required to preserve settled legal principles and to comply with the dictates of the Constitution and Federal Law.

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Respectfully submitted,

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